



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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LUIS IGNANCIO AVILA-GIL,

Petitioner,

v.

UNITED STATES OF AMERICA

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Respondent.

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)  
) Cr. No. 07-0917GT

) Cv. No. 08-1893GT

) **ORDER**  
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On October 14, 2008, Petitioner, Luis Ignancio Avila-Gil ("Mr. Avila"), filed a Motion for Reduction of Sentence, presumably pursuant to 28 U.S.C. § 2255. Mr. Avila requests a downward departure based on his status as a deportable alien, which Mr. Avila asserts "should have been considered as a mitigating factor" at his sentencing. The Court has fully considered this matter, including a review of Mr. Avila's brief filed, the authorities cited therein and the arguments presented. For the reasons stated below, Mr. Avila' Motion for Reduction of Sentence is **DENIED.**

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1 First, Mr. Avila pled guilty, pursuant to a written plea agreement, to two counts of illegal  
 2 entry, in violation of 8 U.S.C. § 1325. In the written plea agreement, Mr. Avila explicitly waived  
 3 his right to appeal and/or collaterally attack his conviction or sentence. The Ninth Circuit has long  
 4 acknowledged that the terms of a plea agreement are enforceable. *See, United States v.*  
 5 *Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1282 (1997). Since Mr. Avila  
 6 expressly waived his statutory right to appeal or collaterally attack his sentence in his plea  
 7 agreement, Mr. Avila is now precluded from challenging that sentence pursuant to 28 U.S.C. §  
 8 2255. *See, United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993) (holding that a knowing  
 9 and voluntary waiver of a statutory right is enforceable).

10 Moreover, even if Mr. Avila had not expressly waived his right to appeal or collaterally  
 11 attack his sentence, his petition would still fail. In essence, Mr. Avila argues that because of his  
 12 status as a deportable alien, he is "ineligible[] for pre-release custody and minimum security  
 13 confinement." Mr. Avila argues that the Court should grant him a downward departure because  
 14 of his status. However, Mr. Avila's argument that the Court should depart downward because  
 15 he is a deportable alien is precluded by statute and current Ninth Circuit case law. By statute,  
 16 the Court may depart downward only if there are "aggravating or mitigating circumstances . . .  
 17 not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. § 3553(b).  
 18 Specifically, the Ninth Circuit has held that the threat of deportation is not a factor that the  
 19 district court may consider for sentencing purposes. *United States v. Alvarez-Cardenas*, 902  
 20 F.2d 734, 737 (9th Cir. 1990).<sup>1</sup> Accordingly,

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 26 <sup>1</sup> The Ninth Circuit decided, in an unpublished opinion, that the defendant, like Limon, was not  
 27 entitled to a six month reduction in his sentence under 18 U.S.C. § 3553(b) because as a  
 28 deportable alien he is not eligible to spend the last six months of his sentence in a half way  
 house pursuant to 18 U.S.C. § 3624(c). *See United States v. Zepeda-Valles*, 87 F.3d 1325 (9th  
 Cir. 1996).

1           **IT IS ORDERED** that Mr. Avila's Motion to Modify Sentence is **DENIED**.

2           **IT IS SO ORDERED.**

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4           *Nov. 14, 2009*  
5           date

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7           GORDON THOMPSON, JR.  
8           United States District Judge

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10           cc: AUSA Bruce Castetter

11           Petitioner  
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